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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

JOHN JAMES BADGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

HOWARD L. WEITZMAN, P.C.
STEVE COCHRAN
WYMAN, BAUTZER, KUCHEL & SILBERT
A Partnership including Professional Corporations
Two Century Plaza
Fourteenth Floor
2049 Century Park East
Los Angeles, California 90067
Telephone: (213) 556-8000
Attorneys for the Petitioner, John James Badger

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

QUESTIONS PRESENTED

A. WHETHER MR. BADGER'S RIGHT TO PRESENT WITNESSES ESTABLISHING BIAS ON THE PART OF A MAIN GOVERNMENT WITNESS, GUARANTEED BY THE COMPULSORY PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION, WAS VIOLATED BY EXCLUSION OF TESTIMONY UNDER FEDERAL RULE OF EVIDENCE 608(b).

B. WHETHER MR. BADGER WAS DEPRIVED OF RIGHTS GUARANTEED UNDER THE CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION BY THE ADMISSION OF SUMMARY TESTIMONY FROM AN FBI AGENT IN VIOLATION OF RULE 1006 OF THE FEDERAL RULES OF EVIDENCE.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, JOHN JAMES BADGER, respectfully requests that a writ of certiorari issue to review the judgment and Memorandum of the United States Court of Appeals for the Ninth Circuit, filed in the above-entitled case on June 14, 1988.

I.

OPINION BELOW

The Memorandum of the Court of Appeals for the Ninth Circuit, designated not for publication, is attached to this petition as Appendix A. The opinion of the Court of Appeals in a related case pertaining to the issues raised in this petition, *United States v. Knigge*, 832 F.2d 1100 (9th Cir. 1987), *amended*, 846 F.2d 1100 (9th Cir. 1988), is attached hereto as Appendix B. No written decision was rendered by the district court for the Central District of California.

II.

JURISDICTION

The Memorandum of the Court of Appeals for the Ninth Circuit was filed on June 14, 1988. This Court has jurisdiction by virtue of 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL PROVISIONS INVOLVED

The issues raised in this petition implicate Mr. Badger's rights to confront witnesses and to compulsory process, guaranteed under the Sixth Amendment to the United States Constitution. Specifically, the Compulsory Process Clause of the Sixth Amendment guarantees the right of an accused "... to have compulsory process for obtaining witnesses in his favor..." The Confrontation Clause of the Sixth Amendment insures an accused the right "... to be confronted with the witnesses against him ..."

IV.

REASONS FOR GRANTING THE WRIT

The writ sought by this petition should be granted for three reasons. First, the federal court of appeals has rendered a decision conflicting with a decision by this Court on a similar matter. *United States v. Abel*, 469 U.S. 45 (1984). Rules of the Supreme Court of the United States, Rule 17.1(a). Second, the federal court of appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court. Rules of the Supreme Court of the United States, Rule 17.1(c). Third, the Ninth Circuit Memorandum and the published opinion upon which it is based substantially affect rules on which there is an overriding need for national uniformity.

V.

COURSE OF PROCEEDINGS

On November 19, 1985, Mr. Badger and two others, John Hanna Brownfield and Dwaine Knigge, were charged by way of a superseding indictment with one count of wire fraud, 18 U.S.C. § 1343, one count of conspiracy, 18 U.S.C. § 371, two counts of interstate travel in furtherance of unlawful activity, 18 U.S.C. § 1952 and two counts of transporting proceeds of fraud in interstate commerce, in violation of 18 U.S.C. § 2314. Essentially, the indictment alleges that Mr. Badger and the other defendants defrauded and obtained money from stock brokerage companies by transacting fraudulently transferred stock of General Enertech Corporation ("G.E.T."). The indictment is attached hereto as Appendix C. Jurisdiction existed in the district court pursuant to 18 U.S.C. § 3231.

Trial by jury commenced on January 2, 1986. Elroy Richard Giddens was a primary witness for the government. He claimed to be present at meetings between Mr. Brownfield and Mr. Badger at which the alleged scheme was discussed. Examination of Mr. Giddens revealed ongoing litigation between him and Mr. Brownfield. Mr. Giddens stated that, in connection with that litigation, he witnessed and signed certain documents which were notarized. To further establish Mr. Giddens' bias and lack of credibility, the defense sought to present the notary allegedly involved to elicit testimony from her that she did not notarize Mr. Giddens' signature, and that her signature on the documents was forged. The government's objection to this testimony, premised on Federal Rule of Evidence 608(b), was sustained.

During trial, the government was permitted to introduce, over objection, summary testimony of FBI agent John Charles Jones. The summaries purported to explain stock transfers shown by voluminous records of G.E.T.'s former stock transfer agent. Over a hearsay objection, the records themselves were admitted into evidence as foundation for testimony. The records were not introduced as substantive evidence to prove the truth of anything. FBI agent Jones testified, nevertheless, that based upon those records, certain certificates presented for transfer by Mr. Badger and others were derived from stolen certificates. Thus, in his summary testimony, FBI agent Jones relied on the records for a purpose for which they were not admitted into evidence, i.e., to show the truth. Ultimately, the jury rendered a verdict of guilty on each of the counts charged.

Mr. Badger took an appeal challenging, among other things, the evidentiary rulings of the district court. The court of appeals had jurisdiction by virtue of 28 U.S.C. § 1291. The matter was submitted to the court of appeals on June 10, 1988 and on June 14, 1988, an appellate panel affirmed the rulings of the district court and the judgment of conviction.

The court of appeals, by way of a memorandum disposition, explained that the issues raised herein, the admissibility of the summary testimony and evidence of bias by Mr. Giddens, are governed by its published opinion pertaining to co-defendant Mr. Knigge, *United States v. Knigge*, 832 F.2d 1100 (9th Cir. 1987), *amended*, 846 F.2d 591 (9th Cir. 1988). In that opinion, the court of appeals held, in pertinent part, that, although the summary testimony of FBI agent Jones was admitted erroneously, the error, at least as to Mr. Knigge, was harmless. With respect to the testimony of the notary against

Mr. Giddens, the court of appeals held that it was properly excluded under Federal Rule of Evidence 608(b) as extrinsic evidence of a collateral matter. *See* Memorandum of the Ninth Circuit Court of Appeals, dated June 14, 1988, attached hereto as Appendix A. *See also, United States v. Knigge*, 832 F.2d 1100 (9th Cir. 1987), *amended*, 846 F.2d 591 (9th Cir. 1988), attached hereto as Appendix B.

VI.

STANDARDS OF REVIEW

Decisions regarding the admissibility of evidence which involve a factual, rather than legal inquiry, are reviewed for an abuse of discretion. The construction of the Federal Rules of Evidence by the district court and the court of appeals, however, is a question of law subject to *de novo* review. *United States v. McClintock,* 748 F.2d 1278 (9th Cir. 1984) *cert. denied*, 474 U.S. 822 (1985).

Misapplications of the Federal Rules of Evidence that do not amount to constitutional error require reversal when it is reasonably probable that the verdict was affected by the evidence improperly excluded or admitted. *United States v. Soulard*, 730 F.2d 1292, 1296 (9th Cir. 1984). Erroneous constructions of evidentiary rules that abridge constitutional rights, however, mandate reversal unless the error is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

VII.

STATEMENT OF FACTS

From 1973 through 1976, Dominic Del Grande was the secretary-treasurer and the stock transfer agent for General Enertech, Inc. ("G.E.T."), a small research and development company in San Diego, California. In 1976, American Registrar and Transfer Company ("American Registrar"), owned by co-defendant Dwaine Knigge, replaced Mr. Del Grande as transfer agent and received G.E.T.'s stock transfer records.

Toward the end of 1979, it was discovered that a stock certificate of 500,000 shares, belonging to Mr. Possell, the president of G.E.T., was missing. Mr. Del Grande apparently issued new certificates for the 500,000 shares and made some of them out in the name of four men who had no right to the stock. Mr. Del Grande also delivered nine other stock certificates, representing a total of 402,000 shares, to four men named Paduano, Madrid, Nardi and Rizzitello.

Subsequently, G.E.T. issued an order to stop transfer of the certificates taken and wrongfully issued by Mr. Del Grande. G.E.T. then authorized the issuance of 500,000 shares of stock to Mr. Possell to replace the missing stock. American Registrar issued the new certificates as instructed.

In order to negotiate the certificates in their possession, Mr. Paduano, Mr. Nardi and Mr. Rizzitello consulted with co-defendant John Hanna Brownfield, who had obtained some of the certificates subject to the stop order from Mr. Madrid. Mr. Paduano and Mr. Brownfield later sought the assistance of Mr. Badger, a stock promoter in Salt Lake City. After consulting an attorney, it was decided that a lawsuit would be necessary to lift the

stop order so that Mr. Brownfield could negotiate his G.E.T. stock. In April 1981, such a suit was filed in state court by Mr. Brownfield against American Registrar and G.E.T. Mr. Knigge, on behalf of American Registrar, consulted extensively about the lawsuit with G.E.T.'s lawyer and its vice president. Mr. Knigge was concerned about the lawsuit and requested that G.E.T. allow him to transfer the shares at issue.

On May 6, 1981, a consent to entry of judgment was filed in the lawsuit, signed by Mr. Knigge, along with a stipulation for dismissal, signed by counsel for Mr. Brownfield and Mr. Knigge. Pursuant to the consent and stipulation, the trial court ordered the transfer agent to issue new certificates for the shares of G.E.T. that were the subject of the lawsuit. Counsel for Mr. Brownfield, Robert Meredith, prepared the consent and waiver which resolved the lawsuit, after Mr. Knigge stated that he would consent to an order requiring transfer of the stock. Mr. Knigge advised Mr. Meredith that G.E.T. officials examined the records and were satisfied that the shares were legitimate and transferable.

The court order resulted in removal of the stop order on the G.E.T. stock at American Registrar. Mr. Badger redeemed the certificates possessed by Mr. Brownfield and others, and new certificates were issued to Mr. Badger, Mr. Brownfield and others. These newly issued certificates were later transfered among numerous other parties, including Mr. Knigge. Later, G.E.T. denied authorizing Mr. Knigge to consent to the judgment and to the issuance of new certificates.

A. THE GOVERNMENT'S THEORY.

The theory of the prosecution was that Mr. Paduano, Mr. Brownfield, Mr. Badger and others[1] knew that the certificates they possessed were illegitimate and desired to circumvent the stop order to obtain new, negotiable certificates. For that purpose, the lawsuit was filed to challenge the stop order in collusion with Mr. Knigge who, for a portion of the stock, consented to a judgment and caused his company to issue the needed new certificates.

B. MR. BADGER'S THEORY OF THE DEFENSE.

Mr. Badger contended at trial that he was approached by Mr. Brownfield to help obtain the transfer of stock Mr. Badger believed legitimately belonged to Mr. Brownfield. Mr. Badger denied having intent to defraud or requisite knowledge that the stock in question was obtained by fraud.

C. EVIDENTIARY RULINGS AT TRIAL.

1. The Limitation On Defense Evidence To Establish Bias Of Witness Giddens.

Elroy Richard Giddens was the primary government witness in this matter. He claimed to be present at meetings between Mr. Brownfield and Mr. Badger at which they discussed the alleged scheme to defraud. Mr. Giddens testified to admissions on the part of Mr. Badger and Mr. Brownfield to the effect that they knew the stock in question was "hot" and that the trans-

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[1]Mr. Paduano, Mr. Nardi and Mr. Rizzitello were indicted separately for the same alleged scheme with which Mr. Badger was charged. All three men were acquitted following trial by jury.

fer agent, Mr. Knigge, was paid off in order to circumvent the stock transfer order.

Mr. Giddens was extensively cross-examined. Part of that examination involved an attempt by the defense to establish Mr. Giddens' bias toward Mr. Brownfield and the other defendants. At pertinent times, litigation between the two men was ongoing. Mr. Giddens claimed that he witnessed certain documents pertaining to the litigation and that his signature on them was notarized. The defense produced and sought to elicit the testimony from the notary who, according to Mr. Giddens, notarized his signature. The notary would have testified that she never notarized Mr. Giddens' signature on the documents and that her signature on the documents was a forgery. The trial court excluded this testimony, ruling that it related to a specific incident of dishonesty which, under Federal Rule of Evidence 608(b), could not be proven extrinsically.

2. Re: Stock Transfer Records Prepared By Mr. Del Grande.

G.E.T.'s former transfer agent, Mr. Del Grande, prepared stock transfer records reflecting the cancellation of Mr. Possell's 500,000 share certificate and the issuance of new certificates. These stock transfer records were introduced by the government, over a hearsay objection, as a foundation for testimony about the transfer of certificates originating from the missing certificate of Mr. Possell. These records were not introduced substantively, to prove the truth of anything.

Summaries of these records, made by FBI agent Jones, were introduced into evidence over objection. The summaries of agent Jones explained the unauthorized transfers reflected by Mr. Del Grande's records. Agent Jones testi-

fied, on the basis of the records, that the certificates presented for transfer on May 6, 1981, the date of the consent judgment releasing the stop order on the shares, were derived from the stolen certificates of Mr. Possell. Thus, through the testimony of the FBI agent, Mr. Del Grande's records were used for a purpose for which they were not admitted, i.e., to show that the certificates released for transfer through the Brownfield lawsuit were the ones wrongfully issued by Mr. Del Grande.

VIII.

ARGUMENT

A. THE EXCLUSION OF TESTIMONY FROM A DEFENSE WITNESS PURSUANT TO RULE 608(b) VIOLATED MR. BADGER'S CONSTITUTIONAL RIGHT TO COMPULSORY PROCESS, BECAUSE THE EVIDENCE WAS PROBATIVE OF BIAS ON THE PART OF A PRIMARY GOVERNMENT WITNESS.

Rule 608(b) of the Federal Rules of Evidence provides in pertinent part:

> Specific instances of conduct of a witness, for the purpose of attacking or supporting credibility . . . may not be proved by extrinsic evidence.

The rule prohibits the introduction of extrinsic evidence of a witness' past misconduct, other than conviction of a crime, for the purpose of attacking a witness' credibility. Evidence that happens to include prior misconduct may be admissible, however, when offered to show the witness' possible bias or self interest in testifying. *United States v. Noti*, 731 F.2d 610, 612 (9th Cir. 1984).

Bias is a term used to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor or against a party. Bias may be the result of dislike or fear of a party, or by self-interest on the part of a witness. Proof of bias is always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy or truth of a witness' testimony. *United States v. Abel,* 469 U.S. 45, 52 (1984).

In *United States v. Abel, supra,* this Court held that extrinsic evidence showing the membership of defendant and a defense witness in a prison gang which required its members to lie, cheat, steal and kill to protect each other was sufficiently probative of defense witness' possible bias toward defendant to warrant its admission into evidence. This Court noted that merely because the evidence might also serve to impeach the witness' veracity directly does not render it inadmissible under Rule 608(b):

> But there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case. It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar.

Id. at 56.

The testimony proffered by Mr. Badger was of the very kind discussed in *Abel.* Mr. Giddens was a party to a lawsuit filed by Mr. Brownfield. The defense sought to demonstrate Mr. Giddens' bias against the defendants by

offering testimony that he had forged documents involving that litigation. The testimony would have showed that Mr. Giddens deliberately committed self-serving acts of deception against the interest of Mr. Brownfield. Moreover, in light of the evidentiary rules which permit a litigant to impeach a witness with evidence of a prior crime,[2] Mr. Giddens had a vested interest in assisting the government secure a conviction against the defendants. Such convictions could be used to impeach Mr. Brownfield in the pending civil litigation between Giddens and Brownfield. Thus, the defense testimony was probative of Mr. Giddens' bias and his motive to embellish his testimony against the defendants. Incidentally, the defense testimony indicated that Mr. Giddens was lying to the jury when he denied having ever done such act. Notwithstanding the vigorous cross-examination by defense counsel, the jury was not permitted to consider defense evidence of the prior act by Mr. Giddens demonstrating his bias against Mr. Badger.

Refusing to allow Mr. Badger to introduce testimony probative of Mr. Giddens' bias violated Mr. Badger's right to compulsory process guaranteed by the Sixth Amendment. Few rights are more fundamental than that of an accused to present witnesses in his own defense. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *see also Faretta v. California*, 422 U.S. 806, 818 (1975). Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. *United States v. Blackwell*, 694 F.2d 1325, 1333 (D.C. Cir. 1982).

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[2] *See, e.g.*, Federal Rules of Evidence 609.

The district court's ruling prohibiting the testimony of the notary for the purpose of showing Mr. Giddens' bias unconstitutionally interfered with Mr. Badger's right to present a defense. As this Court recognized in *Abel,* bias is always relevant in a criminal proceeding, and the jury should be permitted to consider evidence indicative of bias. *Abel,* 469 U.S. at 52; *See also United States v. Noti,* 731 F.2d at 612. Because the district court's error is of constitutional dimension, such error must be harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. at 24.

The Ninth Circuit's opinion in *Knigge,* without citation of authority, ruled that the district court correctly applied Federal Rule of Evidence 608(b). The court of appeals reasoned that "Giddens' bias against Brownfield was brought out by very extensive cross-examination of Giddens on a civil law suit filed against him by American General Petroleum Co. and Brownfield as its president." *Knigge,* 832 F.2d 1100, 1109 (9th Cir. 1987). Thus, the court of appeals recognized that the notary's testimony was probative of bias, but excluded the testimony because some bias had already been demonstrated in cross-examination. The court of appeals cites no authority — and none is revealed by independent research — supporting the proposition that a defendant is limited to showing bias through cross-examination, and may not offer evidence to illustrate other acts which indicate bias. Mr. Badger's attempt to demonstrate bias goes beyond showing that Mr. Giddens was involved in civil litigation against Mr. Brownfield. The defense had a right to present testimony proving that Mr. Giddens engaged in deliberate falsification of documents to acquire leverage over another party to a lawsuit. Because that other party was a defendant in this case, and Mr. Giddens' testimony was vital to the prosecution against Mr. Badger, the trier

of fact should have been allowed to judge Mr. Giddens' bias in favor of a guilty verdict.

The court of appeals decision in this matter is contrary to this Court's decision in *Abel,* which permits the introduction of extrinsic evidence to show bias. Because Mr. Giddens offered testimony crucial to the government's case, the district court's erroneous exclusion of testimony establishing his bias cannot be deemed harmless beyond a reasonable doubt.

B. THE ADMISSION OF SUMMARY TESTIMONY BY THE FBI AGENT IN VIOLATION OF FEDERAL RULE OF EVIDENCE 1006 WAS NOT HARMLESS, AND DEPRIVED MR. BADGER OF HIS RIGHT TO CONFRONTATION.

Rule 1006 of the Federal Rules of Evidence provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

The purpose of Rule 1006 is "... to allow the use of summaries when the volume of documents being summarized is so large as to make their use impractical or impossible." *United States v. Johnson*, 594 F.2d 1253, 1255 (9th Cir.), *cert. denied sub nom., Richey v. United States*, 444 U.S. 964 (1979). Such a rationale implies that instead of using a summary, the proponent could introduce the underlying documents upon which the summary is based. *Id.*; *see United States v. Smyth*, 556 F.2d 1179, 1184 & n. 11 (5th Cir.), *cert. denied*, 434 U.S. 862 (1977). The propo-

nent cannot abrogate other restrictions on admissibility — like the hearsay rule — by the use of summaries. *Johnson,* 594 F.2d at 1255. The Court has never addressed the prerequisites to admissibility under Rule 1006, or how erroneous applications of the rule are to be evaluated.

The summaries made by the F.B.I. agent were used in his testimony in violation of Rule 1006, and the Ninth Circuit so held in *Knigge.* With respect to defendant Knigge, the Ninth Circuit found the error to be harmless. The court of appeals provided no authority or rationale for its conclusion other than to note that

> "[p]roof of Knigge's precise crimes did not depend on showing the origin of the nine certificates but on showing that he was paid a bribe to breach his fiduciary duty as a transfer agent to consent to Brownsfield's suit. Jones' erroneously admitted testimony did not go to this central issue." *Id.* at 1108.

The court did not indicate in *Knigge* whether the error was necessarily harmless with respect to the other defendants. Indeed, the court noted that the error was harmless as to Mr. Knigge in light of the nature of the theory under which he was indicted — as the recipient of a bribe. That theory is not dependent upon proof of the fact that the stocks were stolen.

Such a cursory treatment of Mr. Badger's appeal presents, *inter alia,* two evidentiary issues. First, the opinion in *Knigge* and the unpublished memorandum do not indicate the standard of proof by which the court evaluated the evidentiary error — i.e. whether such error was harmless beyond a reasonable doubt or more probably harmless than not. Second, the court of appeals, in merely adopting the *Knigge* opinion for the purposes of Mr. Badger's appeal, did not evaluate the evidentiary

error as it affected the case against Mr. Badger. Yet, the *Knigge* opinion suggests that the evidentiary error might not be harmless with respect to other defendants, because Mr. Knigge's alleged culpability was premised upon a different theory than the alleged culpability of Mr. Badger and Mr. Brownfield.

The district court erred by allowing a summary witness with the imprimatur of the government, FBI agent Jones, to use the stock transfer records for a purpose on which they were not admitted — nor could have been admitted — to show the truth of the inference that the G.E.T. stock in which Mr. Badger dealt was derived from the missing certificate of Mr. Possell. Such a use of the records constituted a hearsay violation. Essentially, through the F.B.I. agent, the government elicited declarations from Mr. Del Grande explaining the perceived import of certain entries in the stock transfer records.

1. The Admission Of Summary Testimony In Violation of Rule 1006 of the Federal Rules of Evidence Deprived Mr. Badger Of Rights Under The Confrontation Clause Of The Sixth Amendment.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The court of appeals ruled in *Knigge* that the district court erred in admitting the summary testimony of the F.B.I. agent. The improper use of the stock records through testimony presented a hearsay problem because they were offered to show the truth. The evidentiary error violated Mr. Badger's constitutional right to confrontation. *See United States v. Mouzin*, 785 F.2d 682, 691-93 (9th Cir.), *cert. denied sub nom., Carvajal v. United States*, 107 S.Ct. 574 (1986) (admission of a ledger and computer printout which were hearsay

was plain error, violating defendants' right to confrontation); *United States v. Ordonez*, 737 F.2d 793 (9th Cir. 1983) (same).

Under the Confrontation Clause, when a hearsay declarant is not present for cross-examination, the government must demonstrate that he or she is unavailable. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Upon such a showing, the government must show that the declarant's statement contains "indicia of reliability." *United States v. Miller*, 830 F.2d 1073, 1077 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1592 (1988).[3]

The mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process of criminal trials by assuring that the trier of fact has a satisfactory basis for evaluating the truth of an out of court statement. *Dutton v. Evans*, 440 U.S. 74, 89 (1970) (plurality opinion); *California v. Green*, 399 U.S. 149, 161 (1970). Where constitutional values are implicated, the circumstantial guarantees of trustworthiness justifying departure from the general rule excluding hearsay should be closely examined. *United States v. Houser*, 746 F.2d 55, 62 (D.C. Cir. 1984) (reversing conviction due to admission of forms that constituted hearsay).

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[3]This Court stated that an out of court declaration is reliable if:

(1) it does not contain an express assertion of past fact;

(2) the possibility that it is founded on faulty recollection is remote;

(3) the circumstances suggest that the declarant is not misrepresenting the facts; and

(4) the declarant had personal knowledge of the matters asserted in the statement. *Dutton v. Evans*, 440 U.S. 74 (1970) (plurality opinion).

The admission of the stock records and summary testimony violated the Confrontation Clause. There was no formal showing that the declarant, Mr. Del Grande, was unavailable, and the government failed to provide a "showing of particularized guarantees of trustworthiness." *See Ohio v. Roberts, supra.*

2. Because The Erroneous Admission Of The Summary Evidence Was Of Constitutional Dimension, The Court Of Appeals Should Have Applied A Standard Of Harmless Beyond A Reasonable Doubt.

The court of appeals did not articulate in *Knigge* the standard of harmlessness with which it evaluated the concededly erroneous evidentiary admission. The trial court's error in admitting the summaries pursuant to Rule 1006 of the Federal Rules of Evidence warrants the application of the strict, harmless "beyond a reasonable doubt" standard because the error resulted in a hearsay violation abridging Mr. Badger's right to confrontation.

This Court has not yet addressed the standard of harmlessness applicable to a violation of Rule 1006 when the violation allows unreliable hearsay evidence to reach the jury. Insofar as the evidentiary error implicates the right of confrontation, the strict standard of harmlessness is mandated by *Chapman, supra.*

3. Independent Of The Applicable Standard Of Harmlessness, The Court Of Appeals Erred In Finding That The Evidentiary Error Was Harmless As To Mr. Badger.

The charges against Mr. Badger for wire fraud, conspiracy, interstate travel in furtherance of an unlawful activity, and transporting proceeds of fraud in interstate commerce rest upon proof by the government that the

stock certificates in question were stolen and that Mr. Badger knew the certificates were stolen. Although the summary testimony was offered by the government for that purpose, the summary records were not. Even if other evidence also suggested to the jury that the stock certificates were stolen, the jury may have given undue weight to concededly inadmissible testimony by an agent of the government. *See United States v. Houser*, 746 F.2d 55, 63 (D.C. Cir. 1984) (reversing conviction based on evidentiary error in admitting a form under the business records exception where the form was fraught with hearsay problems).

The acknowledged error in admitting the evidence — independent of the applicable harmlessness standard — is not harmless as to Mr. Badger. The charges against Mr. Badger depended precisely on the type of proof and inference therefrom erroneously provided by F.B.I. agent Jones. Inasmuch as the inadmissible evidence provides an important part of the proof to an essential element of the crimes charged, the erroneous admission is by no means probably harmless, much less harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. The convictions sustained by Mr. Badger should be reversed. This Court should grant *certiorari* to articulate the process by which errors under Rule 1006 are analyzed.

IX.

CONCLUSION

The cumulative, prejudicial effect of the erroneous admission of summary testimony and the exclusion of defense testimony regarding bias compels a reversal of Mr. Badger's convictions. Even if either error taken alone is harmless, cumulatively these errors are patently prejudicial and not harmless by any standard. *See Fahy v. Connecticut,* 375 U.S. 85, 91 (1963) (noting that the Court should not ignore the "cumulative prejudicial effect" of the evidence).

Petitioner John James Badger respectfully urges this Court to grant review of this case. The rulings of the district court and court of appeals misapply the Federal Rules of Evidence, and at least one decision of this Court. Mr. Badger has been deprived of fundamental rights guaranteed under the Sixth Amendment. Review by this Court is appropriate and necessary.

DATED: August 10, 1988

Respectfully submitted,

HOWARD L. WEITZMAN, P.C.
STEVE COCHRAN
WYMAN, BAUTZER, KUCHEL & SILBERT

By _____
HOWARD L. WEITZMAN
Attorneys for Petitioner,
John James Badger

No. 87-5029

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN JAMES BADGER,
Defendant-Appellant.

D.C. No. CR 85-0704-WJR-3

MEMORANDUM*

On Appeal from the United States District Court for the Central District of California
William J. Rea, District Judge, Presiding.
Filed, June 14, 1988. Cathy A. Catterson, Clerk, U.S. Court of Appeals

Argued December 7, 1987
Submitted June 10, 1988**
Pasadena, California

Before: O'SCANNLAIN, LEAVY, Circuit Judges, and KING***, District Judge

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Submission in this case was deferred pending the issuance of the mandate in *United States v. Knigge,* 832 F.2d 1100 (9th Cir. 1987).

*** The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

APPENDIX A

OVERVIEW

John Badger appeals his convictions of charges based on his involvement in a scheme to transfer stock derived from a stolen certificate. Badger was convicted of one count of wire fraud, 18 U.S.C. § 1343; one count of conspiracy, 18 U.S.C. § 371; two counts of interstate travel in furtherance of unlawful activity, 18 U.S.C. § 1952; and two counts of interstate transportation of stolen securities, 18 U.S.C. § 2314. Badger asserts that co-conspirator statements and stock transfer records were erroneously admitted and evidence offered to impeach a prosecution witness was erroneously excluded. Badger also challenges the sufficiency of the evidence to support his convictions of interstate transportation of stolen securities. We affirm the convictions.

DISCUSSION

Badger and two co-defendants, John Brownfield and Dwaine Knigge, were tried together. All were convicted. The Ninth Circuit recently affirmed Knigge's conviction. *United States v. Knigge*, 832 F.2d 1100 (9th Cir. 1987). The facts and proceedings in the district court are fully described in that opinion. The opinion is controlling on three of the four issues raised by Badger: the admissibility of the co-conspirator statements and stock transfer records and the exclusion of impeachment evidence. *Id.* at 1103-07 & 1108-09.

Badger contends the evidence was insufficient to support his convictions for violating 18 U.S.C. § 2314. Badger was charged with causing, on two separate occasions, Brownfield's interstate transportation of cashier's checks which Badger knew had been obtained by fraud. Badger gave Brownfield the two checks, which represented proceeds from the stock sale.

Section 2314 provides: "Whoever transports in interstate or foreign commerce any . . . securities . . . of the value of $5,000 or more, knowing the same to have been . . . taken by fraud . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both." 18 U.S.C. § 2314 (1970). For conviction under section 2314 it is not necessary to show that a defendant actually transported the item personally. *Pereira v. United States,* 347 U.S. 1, 8 (1954). It is sufficient if the defendant caused it to be done. *Id.* "The actor is at least responsible under [section 2314] for the reasonably foreseeable consequences of his acts." *United States v. Masters,* 456 F.2d 1060, 1061 (9th Cir. 1972).

Badger knew the stock certificates belonged to individuals in Southern California and that Brownfield traveled between Utah and California to transfer the stock and its proceeds. Thus, it was reasonably foreseeable to Badger that his delivery of the cashier's checks to Brownfield would result in their delivery to California. The evidence is sufficient to support his convictions.

CONCLUSION

The district court did not err in its exclusion or admission of evidence. The evidence is sufficient to support Badger's convictions under 18 U.S.C. § 2314. His convictions are affirmed.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DWAIN KNIGGE,
Defendant-Appellant.

No. 86-5099.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted October 8, 1987.

Decided November 16, 1987.

Appeal from the United States District Court for the Central District of California.

Before ANDERSON, FERGUSON and NOONAN, Circuit Judges.

NOONAN, Circuit Judge:

Dwain Knigge appeals his conviction of wire fraud in violation of 18 U.S.C. § 1343; conspiracy to commit wire fraud, to transport in interstate commerce property taken by fraud, and to commit bribery all in violation of 18 U.S.C. § 371; and of travel to commit bribery in violation of Utah State Law and in violation of 18 U.S.C. § 1952. We affirm the conviction.

FACTS

In 1975 Dominic Del Grande was the secretary-treasurer and stock transfer agent of G.E.T., a small research and development company in San Diego, California. Del Grande stole a stock certificate of 500,000 shares of stock

belonging to the company's president, C.R. Possell and canceled it. In debt to a sinister group of lenders, Del Grande paid off by issuing new certificates in place of the old, making them out in the name of four Mexicans who had no right to the stock and no part in any conspiracy and whose names were used as covers, and delivering nine such certificates representing a total of 402,000 shares to Robert Paduano and his associates, Al Madrid, Nick Nardi and Michael Rizzitello.

In 1981 the stock was selling for about $5.00 a share and the illegitimate certificates were worth about $2 million, if they could be negotiated. Possell had discovered the loss of his certificate and knew about the fraudulent certificates issued in its place. G.E.T. had put a stop transfer in effect on their transfer. Del Grande had in the meanwhile died. The new stock transfer agent was American Registrar and Transfer Co. of Salt Lake City, Utah. Its owner was Knigge.

The problem of their possessors was to circumvent the order and obtain new, negotiable certificates. To obtain their objective, Paduano and his associates involved John Hanna Brownfield, who in turn enlisted John James Badger, a stock promoter in Salt Lake City. Paduano, Brownfield and Badger developed a plan in accordance with which the certificates would be presented to the transfer agent for payment and a suit brought to set aside the stop order; Knigge would be bribed to cause the transfer agent to consent to the suit and would then issue the new certificates. The plan had some initial success. Brownfield went to Salt Lake City, hired a lawyer, Robert Meredith, and filed suit against Knigge's company. Without telling G.E.T. of the suit, Knigge on May 9, 1981

consented to judgment and the same day issued the new certificates. In return for his services, Knigge in May and June 1981 was paid a portion of the stock.

ANALYSIS

Knigge, Brownfield and Badger were tried together. All were convicted. In his appeal Knigge primarily challenges the admission of certain evidence against him. We will review each challenge in turn.

1. *The Admissibility of the Testimony of Deidre Burton.* Burton was the administrative assistant of Paduano in his capacity as president of TICO Financial, a financial services company, in whose name 800,000 of the new certificates were issued; she was also secretary-treasurer of this company and Paduano's live-in girlfriend. She testified extensively as to Paduano's arrangements with Brownfield and as to how Brownfield brought back from Salt Lake City certificates for 300,000 shares of G.E.T. stock on May 14, 1981 and $82,000 in cashier's checks on May 21, 1981. After depositing these checks, Burton met with Brownfield and Paduano to discuss the division of the G.E.T. stock and its proceeds. Brownfield produced a diagram. The diagram showed that 402,000 shares had been obtained; that he had brought back 300,000; and that the rest had gone either directly or through nominees to Brownfield himself, Badger, and Knigge.

This testimony was admitted against all three defendants. It was properly admitted. Brownfield's diagram and his accompanying explanation were statements of a co-conspirator with Burton and Knigge. That a conspiracy existed involving Knigge and Brownfield was proved by the statements themselves, *United States v. Bourjaily,*

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___ U.S. ___, 107 S.Ct. 2775, 2782, 97 L.Ed.2d 144 (1987), as well by the other evidence of conspiracy set out below:

(1) Although Knigge informed G.E.T. when Brownfield's suit was first brought against American Registrar and Transfer and G.E.T. had its counsel, Marvin Sears, discuss the suit with Knigge, and although Knigge was told by Sears that some of the shares at issue came from the stolen certificate, Knigge failed to inform Sears when the complaint was amended to make G.E.T. a defendant and Knigge consented to judgment in the suit without either giving notice to G.E.T. or raising the objection that the shares were based on a theft. Knigge falsely told Meredith, Brownfield's attorney, that G.E.T. was "perfectly satisfied that the shares were transferable and were legitimate" and that he would therefore consent to judgment.

(2) Knigge received part of the proceeds from Brownfield's plan. Tony Ladakis was one of Brownfield's intermediaries in Salt Lake City. On May 20, 1981, he received a G.E.T. certificate from Brownfield for 4,000 shares, of which he entered 1,300 shares in Dwain Knigge's account at Northridge Securities. Knigge thanked Ladakis and on the same day sold the stock for $5,460. Two other certificates, representing 2,500 shares apiece and traceable to the new G.E.T. certificates, were placed in accounts at Western Capital and Securities. The accounts were in the names of Knigge's twin sons. Knigge sold the shares and told the boys that the shares were gifts from him.

(3) On June 22, 1982 Agent Ralph Lumpkin of the Federal Bureau of Investigation interviewed Knigge, tell-

ing him that he was investigating the allegation that Knigge had been linked to the transfer of 402,000 shares of G.E.T. stock. Knigge told him that he had transferred the stock because Sears, counsel for G.E.T. had told him it was okay to do so. This statement was a falsehood, protecting Knigge and the others involved.

To prove a conspiracy in order to obtain admission of a co-conspirator's statements, the government need only prove the existence of the conspiracy by a preponderance of the evidence. In this case, Knigge's lies, his acquiescence in the sham suit where some of the stock involved was to his knowledge based on a stolen certificate, and his participation in the proceeds proved that the conspiracy existed.

The statements reported by Burton were made by Brownfield in the course of the conspiracy and in furtherance of the conspiracy, for what Brownfield had to say bore on the division of the spoils of the conspiracy. The testimony was an exception to the hearsay rule. Fed.R.Evid. 801(d)(2)(E).

2. *The Testimony of Elroy Richard Giddens.* Giddens is a man of wide experience: a seaman in the United States Navy, honorably discharged; a soldier in Vietnam, decorated and honorably discharged; the manager of a finance company; a policeman with the Anaheim Police Department; a law student at Western State University in Orange County; a teacher at the same institution, teaching Wills, Trusts, and Contractual Law; the financier of an amphetamine operation, from which he made $7,000; a felon convicted for his part in the distribution of this drug; and a lawyer disbarred in October 1981 for the same offense. *In re Giddens,* 30 Cal.3d 110, 177 Cal.Rptr.

673, 635 P.2d 166 (1981). At Western, Brownfield had been his student and was later his law clerk.

Released from prison in 1979, Giddens discussed various business ventures with Brownfield and began to share office space with him in El Toro, California. In March of 1981 Brownfield consulted Giddens about the G.E.T. stock certificate and his plan to file a lawsuit as their bona fide purchaser in order to get rid of the stop transfer order. Brownfield told Giddens the stock was "hot", meaning "stolen". Giddens knew Brownfield was not a bona fide purchaser and advised him that he would commit perjury in bringing the suit. Giddens suggested a direct approach to G.E.T. in San Diego. Brownfield told Giddens that he, Brownfield, would be paid for what he did and that this money, plus credit Paduano would extend, would help launch a clothing business Brownfield and Giddens were planning to start. Giddens, thus, as he testified, had "indirectly" an interest in Brownfield's suit. They discussed the suit "in many conversations." Giddens asked Brownfield questions "to protect himself." He did not want Brownfield to get into trouble and was looking out for "him and me both."

When Brownfield went to Salt Lake City he telephoned Giddens to tell him that the complaint had been filed and that if Paduano called in to tell him everything was all right. On his return from Salt Lake City, Giddens and Brownfield reviewed the complaint and Giddens pointed to an apparent deficiency, which Brownfield said he would ask Meredith, the Salt Lake City attorney, to remedy. In May 1981 Brownfield returned to Salt Lake City and told Giddens that G.E.T. had confessed judgment in the suit. Later in May Brownfield showed Giddens certificates for

300,000 shares of G.E.T. stock in the name of TICO Financial. Brownfield also told Giddens that he had $100,000 in cashier's checks derived from the sale of the G.E.T. stock. During May and June, Nardi and Rizzitello called the office a number of times. Brownfield told Giddens that the stock originally came from them and that they had sent it to Salt Lake City "to get it cleaned up" and had paid too much for this cleaning. He said that they "wanted answers," that is, that he had to account for "all the stock and all the money from the stocks that had been sold." Giddens wanted "to stay on top of what was going on." Brownfield showed Giddens a diagram of how the 402,000 shares or their proceeds were being distributed and said he intended to show it to Nardi and Rizzitello. Knigge was listed on the diagram as a recipient.

On June 2, 1981 Brownfield and Giddens traveled together to Salt Lake City "to find out where all the stock went." Their reservations were made by Deidre Burton at TICO Financial. Badger met them and delivered a brown bag of cash to Brownfield. Brownfield counted the money and said it was $4,000 short; Badger said that 20% had gone to the nominee who sold the stock. Brownfield insisted on meeting the nominee. Badger joined by Meredith and the nominee, then met with Brownfield and Giddens at Dooley's, a club. After the nominee had defended himself and left, Brownfield said that he "had to have some answers for the guys in Los Angeles about where all the stock went." Badger replied, "I have to pay off the transfer agent, I have to pay the attorney, I have to pay the broker, I have to pay the nominees, I have to pay the brokerage houses. It cost a lot of money. Everybody knows it's a hot stock, so they won't do it free."

After this discussion, Badger, Brownfield and Giddens went to the Capital City Bank where Brownfield and Giddens opened an account in the name of "Liberty Oil Corporation" with their names as signatories on the account, and with withdrawals to be made only on their joint signatures. The cash delivered to Brownfield, converted into cashier's checks, was deposited in this account. Giddens also later put money of his own in this account and with Brownfield's approval later drew on it.

Brownfield, Badger, Giddens, and Meredith then met at the Cabana Club, where there was much drinking and Brownfield pressed for a further accounting by Badger of the 100,000 G.E.T. shares Badger had had. Badger again said that he had to "pay off the transfer agent." Brownfield said, "You only gave the transfer agent a few thousand dollars." Giddens asked why it did any good to buy off the transfer agent. Badger said that the agent could transfer the stock whether the company wanted him to or not. In this case the transfer agent "accepted service on behalf of General Enertech and confessed judgment, and they didn't know about it, General Enertech."

Later in the afternoon Knigge himself joined the group. Knigge said to Badger, "I only got half of the $10,000. Where's the rest?" Badger said, "You are getting an apportionate share of the stock as it's being sold off. And we can't sell it too soon. It will depress the market, and General Enertech will find out that their stocks are being traded. If they find out the stocks are being traded, they will fire you as a transfer agent, and the whole thing will be over." Knigge said, "I know that but I still want my money." Brownfield was angry because he had been told Knigge was already paid. After Knigge left, Badger said,

"We'll pay him only what we have to. We need him to finish the deal."

Back at the hotel, Brownfield and Giddens went over "the role" played by Badger and Knigge. Brownfield said the suit had been a sham and judgment in it confessed "unbeknownst" to G.E.T. Giddens asked Brownfield why he had earlier lyingly told him that G.E.T. had confessed judgment. The next morning Giddens asked Brownfield how he expected to get away with it; sooner or later G.E.T. was going to find out their stock was being transferred and traded. Brownfield said, "The transfer agent will handle that. That's what he is paid for."

On June 9, 1981 Giddens again flew to Salt Lake City with Brownfield. Again they met with Giddens and Meredith, and again Brownfield insisted on an accounting. Knigge joined them. Knigge said, "I still haven't got the rest of my money." Badger again explained the need to take time selling the stock. Knigge remained angry, and Brownfield took him aside to calm him down.

About July 1, 1981, Brownfield and Giddens met Nardi, Rizzitello, Joan Sutherland (a friend of Brownfield) and Lew Caveretti at the Hyatt Hotel near the Los Angeles airport. Rizzitello demanded an accounting. Brownfield said everything he had done in Salt Lake City had been cleared by Paduano. Brownfield spoke of the division made between TICO Financial; Paduano personally; Badger; Meredith; the nominees; and Knigge. Rizzitello objected that there was now a stop transfer order on the 300,000 shares he had, so he had paid "half a million dollars" for nothing. Brownfield offered to give him the money he'd made from the deal. Rizzitello said, "That's a drop in the bucket."

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In September of 1981 Brownfield and Giddens were sharing a new office in Tustin, California. Brownfield told Giddens that the G.E.T. stock could be "re-released" if they paid a Mr. Kagel. Badger would again be the intermediary. In October 1981 Badger telephoned Giddens and told him that he had reached an agreement with Kagel by which the G.E.T. stock would become transferable. This plan was never carried out.

The government for its own reasons chose not to indict Giddens as a co-conspirator, but despite his weak disclaimer, "I was not in on the deal," it is evident from his own testimony that Giddens was a co-conspirator with Brownfield, Badger and Knigge in the plot to transfer the G.E.T. stock and make money from the transfer. In March of 1981 he knew of Brownfield's plan to turn stolen certificates into cash. He advised Brownfield on this plan. He accompanied Brownfield to Salt Lake City to work on the division of the proceeds. At least one trip was arranged by TICO Financial. He put part of the proceeds in an account, access to which he controlled and on which he drew. He dealt on the telephone with Paduano and his associates and with Badger. He participated in the meeting where the associates called for an accounting. As late as October 1981 he was active in trying to beat the new stop order and to make the new certificates negotiable. If Brownfield was up to his neck in the conspiracy, Giddens was at least waist high.

All of the conversations to which Giddens testified were made during the course of the conspiracy that ran from March 1981 to at least October 1981. Of course the conspiracy was not over when the first stop order was lifted. The stock had to be sold slowly. A new stop order

blocked the transfer of 300,000 of the shares. The stock had to be turned into cash. The proceeds had to be divided. Giddens worked actively to these ends.

All of the conversations to which Giddens testified were in furtherance of the conspiracy. They related to the plan of action to free the stock, to the division of the spoils, to the accounting for the spoils. The conversations Giddens had alone with Brownfield bore on the *modus operandi* of the conspirators. To be effective, Giddens, as he said, had to "stay on top" of what was going on; he had to ask questions to protect Brownfield and to protect himself.

Knigge attacks the reliability of the hearsay. Giddens was an ex-felon and ex-lawyer, anxious that the government not prosecute him for the very conspiracy about which he was testifying. By Giddens' own admission, Brownfield lied to him once about the Salt Lake City suit, and Brownfield accused Badger of misleading him about the final payment to Knigge.

All of these reasons to discount Giddens' report of what he heard were before the jury. Giddens' status and various other matters bearing on his credibility were in evidence, and it was for the jury to determine if what he reported was still credible. Giddens' report of Brownfield's one lie and Brownfield's skepticism about Badger's reports to him necessarily qualified the weight to be put on Brownfield and Badger's declarations involving Knigge but did not automatically make them untrustworthy. That both Brownfield and Badger had a motive to lie in order to account for where the G.E.T. stock had gone has to be considered against the evidentiary force of the statements of the co-conspirators as they tried to arrange for the division of their loot. Co-conspirators' statements

are "usually irreplaceable as substantive evidence." *United States v. Inadi,* 475 U.S. 387, 106 S.Ct. 1121, 1127, 89 L.Ed.2d 390 (1987):

> Because they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court. When the Government — as here — offers the statement of one drug dealer to another in furtherance of an illegal conspiracy, the statement often will derive its significance from the circumstances in which it was made. Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand. Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy. *Id.* 106 S.Ct. at 1126.

So in this case the statements of Badger and Brownfield are both qualified by the circumstances in which they were made and draw value from the circumstances. Their reliability is corroborated by their fit with the facts otherwise known about Knigge, of which his consent to Brownfield's suit and his sharing in the loot are only the most prominent. The hearsay testified to by Giddens met the requirements of, and was admissible under, Fed.R.Evid. 801(d)(2)(E).

The admissibility of all of the statements of Brownfield under section 801(d)(2)(E) make it unnecessary for us to rule on whether some of them met the criteria of *United States v. Layton,* 720 F.2d 548, 559 (9th Cir.1983) for admission as declarations against penal interest. Two

declarations — those made at the hotel the evening of June 2, 1982 and the morning of June 3 — were admitted on that basis, but we may affirm on the basis of the more comprehensive theory of admissibility under section 801(d)(2)(E). *Cf. United States v. Green,* 648 F.2d 587, 592 (9th Cir.1981); *United States v. Gocke,* 507 F.2d 820, 824 n. 4 (8th Cir.1974).

Knigge's contention that the admission of this evidence violated his right under the Sixth Amendment "to be confronted with the witnesses against him" is completely answered by *Bourjaily,* repeating the earlier holding of *Delaney v. United States,* 263 U.S. 586, 590, 44 S.Ct. 206, 207, 68 L.Ed. 462 (1924) that "there can be no separate Confrontation Clause challenge to the admission of a co-conspirator's out-of-court statement." *United States v. Bourjaily,* ____ U.S. ____, 107 S.Ct. 2775, 2783, 97 L.Ed.2d 144 (1987). "[T]he Confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E)." *Id.*

3. *The Admissibility of Knigge's Handwritten Notes.* Knigge's secretary testified that these notes were in Knigge's handwriting. The notes traced some of the nine certificates to the missing Possell certificate. They were admitted into evidence without objection. Nearly a month later the defendant asked the court to rescind its earlier ruling. The time the notes were prepared was not established, but it was reasonable to infer that Knigge wrote them at the time he was considering making the transfer. The admission of the notes was not plain error.

4. *Admission of the Records of Northridge Securities.* The government produced evidence of records kept

by the "back room" of this brokerage firm and authenticated them through the testimony of Michael Doolin, a trader. He testified that he personally dealt with Ladakis, who deposited the shares in three accounts, one of them Knigge's, and that he dealt personally with Knigge who instructed him to sell the shares. He filled out the top portion of the trade tickets and sent them to the back room. He identified his handwriting on the tops of the trade tickets, but could not personally vouch for the rest of the documents. The relevant testimony by Doolin concerned the trades which led to Knigge receiving the proceeds of the stock. These records were properly admitted. We need not decide and do not decide whether the other records were properly admitted because even if by hypothesis they were not their admission was harmless.

5. *The Admissibility of the Stock Transfer Records Prepared by Del Grande.* These were stock transfer records prepared by Del Grande, the former transfer agent, showing the cancellation of the Possell certificate and the issue of the new certificates. The government did not seek to have them admitted as hearsay under the business records exception to the hearsay rule. They were introduced not to prove the truth of anything but to provide a foundation for testimony regarding the transfers involving the nine certificates, whose origin was the missing Possell certificate.

The hearsay rule does not apply to evidence offered "to establish a foundation for later showing, through other admissible evidence that it was false." *Anderson v. United States,* 417 U.S. 211, 220, 94 S.Ct. 2258, 2260, 41 L.Ed.2d 20 (1974); *United States v. Adkins,* 741 F.2d 744, 746 (5th Cir.1984), *cert. denied* 471 U.S. 1058, 105 S.Ct. 2113, 85

L.Ed.2d 478 (1985). These records said nothing in themselves. They were mute pieces of circumstantial evidence whose significance became clear only by the clearly admissible testimony of Possell that someone had taken his certificate and the Mexicans' testimony that they had not bought, sold, or traded stock other than the 2,500 shares apiece which they had originally acquired. There was no ground to raise a hearsay objection because the records were not hearsay, nor was there any reason to give a limiting instruction when there was nothing in the records which proved anything and their damning significance depended completely on the testimony of the witnesses who showed that they were records of unauthorized transfers.

Summaries of these records made by Agent John Charles Jones of the Federal Bureau of Investigation were introduced into evidence. In these summaries Jones explained and charted the transfers that Del Grande's records showed. Jones was permitted, however, to testify on the basis of the records that the certificates presented for transfer on May 6, 1981 were derived from the stolen Possell certificates. In this testimony, the records were used for a purpose for which they were not admitted, viz., to show the truth. Jones' testimony based on the records was erroneously admitted. The error was, however, harmless. The government was not proving Del Grande a criminal but Knigge. Proof of Knigge's precise crimes did not depend on showing the origin of the nine certificates but on showing that he was paid a bribe to breach his fiduciary duty as a transfer agent and to consent to Brownfield's suit. Jones' erroneously admitted testimony did not go to this central issue.

6. *Limitation on the Cross-Examination of Giddens.* On cross-examination counsel accused Giddens of forging a notary's signature on documents and then sought to examine the notary on the forgery. The government objected and this testimony was excluded under Fed.R.Evid. 608(b) precluding the introduction of specific instances of the conduct of a witness for the purpose of attacking the witness's credibility. The court properly applied the rule. Giddens' bias against Brownfield was brought out by very extensive cross-examinations of Giddens on a civil law suit filed against him by American General Petroleum Co. and Brownfield as its president.

7. *The Admissibility of the Badger-Goldstein Conversation.* In the course of the FBI investigation, Goldstein, a government informer, asked Badger why G.E.T. had changed transfer agents. Badger replied "Well I think they thought that the transfer agent was in cahoots with me . . . or else with . . . Nardi or somebody." The conversation was taped and introduced in evidence. The evidence was not admissible against Knigge but was admitted against him. It is, however, no more than speculation by Badger and had no probative force. Its admission did not contribute to the conviction of Knigge.

8. *Limitation of the Cross-Examination of Giddens of his Definition of Bribery.* Giddens testified that Badger and Brownfield had spoken of paying off Knigge. On cross-examination Giddens was asked: "Now did anybody tell you that they bribed anybody, use those words?" Giddens replied "No sir." The cross-examiner pressed, "You are inferring from the way you interpret the conversation that someone was bribed based upon the words and the verbiage used, correct?" Giddens answered, "Yes sir."

Counsel then attempted to examine Giddens as to what he understood a bribe to be. Defendant's counsel had introduced the term. Giddens was being asked for a legal conclusion. There was no reason to permit the question. The colloquial "paid off" clearly conveyed to the jury what Giddens understood Brownfield and Badger's meaning to be.

9. *The Instructions to the Jury on the Utah Commercial Bribery Statute.* The Utah Commercial Bribery statute requires that a bribe be "contrary to the interests of the employer or principal." *Utah Code Annotated* § 76-6-508(1)(a) and (b). Knigge objects that the term "contrary to the interests" means that there must have been some damage or detriment to the employer and the jury should have been instructed that there was "real damage or detriment" before the statute came into play. The district court read the statute aloud to the jury verbatim. It was not necessary that the court explain every term. It is clear that there was detriment to Knigge's principal, G.E.T., in the issuance of stock certificates based on false representations: G.E.T. could have been in the position of facing claims from bona fide purchasers of these certificates and claims from the true owner. Knigge's claim now that there was "no evidence to support the claim of detriment to the company" is baseless.

Knigge further contends that the court should have instructed the jury on the difference between a bribe and a gratuity. His theory is that any stock he received came after the transfers had been completed and were a kind of tip rather that a bribe. The Utah statute does require that a bribe be arranged in advance of the transaction for which the fiduciary is bribed — that is, the crime in Utah — is to agree to accept any benefit from another

upon an agreement or understanding "that such benefit *will* influence his conduct". Utah Code Annotated § 76-6-508 (emphasis supplied). The trial court so instructed the jury. It stated, "In order to find the violation of the Utah statute you must find the offer or agreement to offer or receive a bribe was for the purpose of influencing future conduct." The instruction was entirely adequate to explain the statute.

10. *Denial of a Severance to Knigge.* Knigge sought severance because of the proposed testimony of Giddens and Burton and the Goldstein tape, invoking *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). *Bruton* involved a confession by a defendant which inculpated his co-defendant — a confession which was clearly inadmissible against Bruton "under traditional rules of evidence," rather than being a recognized exception to the hearsay rule. *Id.* at 128, 88 S.Ct. at 1623. *Bruton* does not require severance when as here, evidence is properly admitted under firmly-rooted exceptions to the hearsay exception. The special evidentiary value of a co-conspirator's statement made in the furtherance of a conspiracy has been elaborated on by Justice Powell writing for the Court in *United States v. Inadi,* supra 106 S.Ct. at 1126.

11. *Knigge's Motion for a Directed Verdict of Acquittal and His Motion for a New Trial.* These two motions depended on the exclusion of the evidence already discussed and the claimed violations of the Confrontation Clause. The contention also was made that no bribe under Utah law had been proved. These contentions have all been examined and found baseless.

AFFIRMED.

NO. CR. 85-704(A) WJR

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
February 1985 Grand Jury

UNITED STATES OF AMERICA,
Plaintiff,
v.
JOHN HANNA BROWNFIELD,
JOHN JAMES BADGER, and
DWAINE KNIGGE,
Defendants.

SUPERSEDING INDICTMENT

18 U.S.C. §§ 1343 and 2 (Wire Fraud); 18 U.S.C. § 371 (Conspiracy); 18 U.S.C. §§ 1952 and 2 (Interstate Travel in Aid of Bribery); 18 U.S.C. §§ 2314 and 2 (Interstate Transportation of Property taken by Fraud)

THE GRAND JURY CHARGES:

GENERAL BACKGROUND ALLEGATIONS

As to all counts of this indictment and hereby incorporated therein by reference, except as otherwise stated:

1. General Enertech Corporation (General Enertech) is a publicly traded Montana corporation with its principal place of business in San Diego, California.

2. Dell Ross was a predecessor of General Enertech which was merged with Idaho Oil and Mines Corporation on about January 5, 1973. The merger agreement caused each share of Dell Ross to be exchanged for 3,000 shares of Idaho Oil and Mines stock.

3. In about April 1973, Idaho Oil and Mines Corporation became General Enertech.

4. C.R. Possell was the majority stockholder in Dell Ross before its merger with Idaho Oil and Mines Corporation. Anthony and Regina Doria were stockholders in Dell Ross before its merger with Idaho Oil and Mines Corporation. Raul Fuentes Martinez, Salvadore Garcia Candiani, Bernardino Llamas Noeggerath and Alberto Pena Hernandez are all Mexican Nationals who were stockholders in Dell Ross before its merger with Idaho Oil and Mines Corporation.

5. At all times relevant to this indictment, C.R. Possell was the president and majority stockholder of General Enertech.

6. In March 1975, 500,000 shares of General Enertech stock in the name of C.R. Possell were transferred without his knowledge or consent into the names of Alberto Pena Hernandez, Salvadore Garcia Candiani and Bernardino Llamas Noeggerath.

7. Between on about September 22, 1975, and on about September 25, 1975, about 177,400 shares of General Enertech stock in the name of Anthony and Regina Doria were transferred into the names of Raul Fuentes Martinez and Salvadore Garcia Candiani.

8. Between September 10, 1975, and October 26, 1976, the shares of General Enertech stock described in paragraphs 6 and 7 above were repeatedly transferred into different names. In addition, about 99,900 shares of General Enertech stock in the name of Raul Fuentes Martinez, about 90,000 shares in the name of Salvadore Garcia Candiani, about 69,900 shares in the name of Bernardino Llamas Noeggerath, and about 50,000 shares in the name of Alberto Pena Hernandez were transferred

into different names and comingled with each other and the stock described in paragraphs 6 and 7 above.

9. By means of the transfers described in paragraph 8 above, a number of new General Enertech stock certificates were created including the following: certificate #2320 in the name of Salvadore Garcia Candiani for 69,900 shares; certificate #2456 in the name of Raul Fuentes Martinez for 108,075 shares; certificate #2457 in the name of Raul Fuentes Martinez for 22,625 shares; certificate #2458 in the name of Salvadore Garcia Candiani for 25,000 shares; certificate #2459 in the name of Salvadore Garcia Candiani for 46,700 shares; certificate #2461 in the name of Raul Fuentes Martinez for 50,000 shares; certificate #2463 in the name of Raul Fuentes Martinez for 25,000 shares; certificate #2903 in the name of Bernardino Llamas Noeggerath for 25,000 shares, and certificate #2905 in the name of Salvadore Garcia Candiani for 30,000 shares. About 115,000 shares of this stock were from the stock of C.R. Possell described in paragraph 6 above.

10. In about November 1976, American Registrar and Transfer Company (American Registrar and Transfer) of Salt Lake City, Utah, was employed by General Enertech as its stock transfer agent.

11. At all times relevant to this indictment, defendant DWAINE KNIGGE was the principal officer of American Registrar and Transfer.

12. It was part of the duties of American Registrar and Transfer and defendant KNIGGE to ensure the integrity of the stock of General Enertech, to obey all stock transfer orders with respect to General Enertech stock and to notify General Enertech of attempts to negotiate

and transfer stock for which stop transfer orders had been issued.

13. During 1979, officers of General Enertech discovered the transfers of stock described in paragraphs 6 and 8 above.

14. In order to prevent the further transfer of the stock described in paragraphs 6 and 8 above, General Enertech placed a stop transfer order with American Registrar and Transfer and defendant DWAINE KNIGGE on all stock in the names of Fuentes, Garcia, Llamas, and Pena.

15. At all times relevant to this indictment, the Utah Code Annotated, Section 76-6-508(1)(a) and (b) provided that an individual is guilty of a criminal offense:

> When, without the consent of the employer or principal, contrary to the interests of the employer or principal: (a) he confers, offers, or agrees to confer upon the employee, agent, or fiduciary of an employer or principal, any benefit with the purpose of influencing the conduct of the employee, agent or fiduciary in relation to his employer's or principal's affairs; or (b) he, as an employee, agent or fiduciary of an employer or principal, solicits, accepts or agrees to accept any benefit from another upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs;
> provided that this Section does not apply to inducements made or accepted solely for purpose of causing a change in employment by an employee, agent or fiduciary.

COUNT ONE

[18 U.S.C. § 1343]

A. THE SCHEME

1. From in about March 1981, and continuing until in about October 1981, in the Central District of California and elsewhere, defendants JOHN HANNA BROWNFIELD, JOHN JAMES BADGER and DWAINE KNIGGE and others both known and unknown to the grand jury, intentionally devised and carried out a scheme to defraud General Enertech and its stockholders and to obtain money and property from stock brokerage companies by means of materially false and fraudulent representations, pretenses, and promises as well as by the concealment and non-disclosure of material facts.

2. In particular, this scheme was devised to do the following:

a. to defraud General Enertech and its stockholders of their right to litigate and legally determine the true ownership of stock in General Enertech and their right to have American Registrar and Transfer and defendant KNIGGE perform honest, loyal and faithful services, decisions and actions free from bribery, corruption, partiality, willful omission, bias, dishonesty, misconduct, conflict of interest and fraud;

b. to defraud stock brokerage companies and obtain money from them by presenting for negotiation and sale shares of General Enertech Corporation stock which had been improperly and fraudulently transferred without disclosing that fact.

B. EXECUTION OF THE SCHEME

To execute this scheme and accomplish these fraudulent purposes, defendants JOHN HANNA BROWNFIELD, JOHN JAMES BADGER, and DWAINE KNIGGE, engaged in and caused various acts, practices, transactions, misrepresentations, concealments and deceptions as follows:

3. In furtherance of the scheme defendant KNIGGE agreed to accept bribes arranged for and to be paid by co-defendants to breach his fiduciary duties which as stock transfer agent he owed General Enertech Corporation and its stockholders.

4. In furtherance of the scheme, defendant KNIGGE telephoned officers and employees of General Enertech, including its counsel in an attempt to have them lift the previously placed stop transfer order.

5. In furtherance of the scheme, defendant BROWNFIELD traveled to Salt Lake City, Utah, to file a lawsuit against General Enertech and American Registrar and Transfer.

6. In furtherance of the scheme, defendants BROWNFIELD and BADGER filed and caused to be filed a lawsuit in the State of Utah for which they knew there was no basis in law or in fact, naming as the only defendant American Registrar and Transfer Company and alleging that JOHN HANNA BROWNFIELD was the owner of the stock described in paragraph 9 of the general background allegations of this indictment.

7. In furtherance of the scheme, defendants BROWNFIELD and BADGER filed and caused to be filed an amended complaint naming as a second defendant in this lawsuit in the State of Utah, General Enertech Corpora-

tion and thereafter failed to serve process on General Enertech.

8. In furtherance of the scheme, defendant KNIGGE misrepresented to General Enertech's officers and employees, including its legal counsel, the nature of the lawsuit described above.

9. In furtherance of the scheme, defendant KNIGGE concealed from General Enertech and its President C.R. Possell that the records of American Registrar and Transfer reflected that a portion of C.R. Possell's missing stock was involved in this lawsuit.

10. In furtherance of the scheme, defendant KNIGGE signed a consent to judgment which enabled the defendants to obtain a court order requiring American Registrar and Transfer to transfer the stock in issue in this lawsuit as requested by the defendants.

11. In furtherance of the scheme, defendant KNIGGE permitted a series of transfers which resulted in the issuance of stock as follows: 39,200 shares into the name of JOHN BADGER; 16,000 shares into the name of Richard Sax; 12,000 shares into the name of Don Anderson; 5,100 shares into the name of JOHN H. BROWNFIELD; 4,000 shares into the name of Tony Ladakis; 100,000 shares into the name of Lina De Genero; 11,000 shares into the name of TICO Financial; 200,000 shares into the name of Tangible Investments Incorporated; and 15,000 shares into the name of O. Robert Meredith.

12. In furtherance of the scheme and in return for making these fraudulent stock transfers, defendant KNIGGE directly and indirectly accepted approximately 6,333 shares of General Enertech stock paid by the co-defendants and others as a bribe.

13. In furtherance of the scheme, the defendants sold and caused to be sold, about 92,000 shares of the stock described in paragraph 11 above at brokerage firms in Salt Lake City, Utah, and in Long Beach, California.

14. In furtherance of the scheme, the defendants received about $283,204.34 of the proceeds of the sale of the stock described in paragraph 13 above as follows:

(a) JOHN HANNA BROWNFIELD received about $132,767.46;

(b) JOHN JAMES BADGER received about $134,019.58;

(c) DWAINE KNIGGE received about $16,419.30.

15. On about May 5, 1981, in the Central District of California, Salt Lake City, Utah, and elsewhere, the defendants, JOHN HANNA BROWNFIELD, JOHN JAMES BADGER and DWAINE KNIGGE, for the purpose of executing this scheme, knowingly caused to be transmitted certain signs, signals and sounds in interstate commerce from Salt Lake City, Utah, to Los Angeles, California, by means of a wire communication, that is, a telephone communication between defendant KNIGGE and Marvin Sears, an attorney for General Enertech.

COUNT TWO

[18 U.S.C. § 371]

A. OBJECTS OF THE CONSPIRACY

1. From as early as in about March 1981, until in about October 1981, in the Central District of California and elsewhere, the defendants JOHN HANNA BROWNFIELD, JOHN JAMES BADGER, and DWAINE KNIGGE, and other co-conspirators both known and unknown to the grand jury, knowingly, willfully and unlawfully agreed, confederated and conspired together to commit the following offenses against the United States;

a. To knowingly and willfully cause to be transmitted certain signs, signals, and sounds in interstate commerce by means of wire communications, that is, telephone communications, for the purpose of executing the scheme to defraud described in count 1 and incorporated herein by reference, in violation of Title 18, United States Code, Section 1343;

b. To willfully transport and cause to be transported in interstate commerce, money and property having a value in excess of $5,000 knowing the same to have been taken by fraud, as described in counts 1, 5, and 6 and incorporated herein by reference, in violation of Title 18, United States Code, Section 2314;

c. To travel in interstate commerce with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, bribery in violation of the laws of the State of Utah and thereafter to perform and attempt to perform acts promoting, managing, establishing, carrying on

and facilitating the promoting, managing, establishing, and carrying on of said unlawful activity, as described in counts 3 and 4 and incorporated herein by reference, in violation of Title 18, United States Code, Section 1952.

B. MEANS OF THE CONSPIRACY

The foregoing objects of the conspiracy were to be accomplished as follows:

2. Certain co-conspirators had in their possession about 402,300 shares of General Enertech stock as described in paragraph 9 of the general background allegations of this indictment.

3. In order to transfer these shares of stock, certain co-conspirators met with the defendant BROWNFIELD and agreed to have BROWNFIELD attempt to sell the stock through defendant BADGER in Salt Lake City, Utah, and split the proceeds.

4. In about April 1981, defendant BROWNFIELD traveled to Salt Lake City.

5. In about April 1981, defendant BADGER introduced defendant BROWNFIELD to attorney O. Robert Meredith for the purpose of filing a sham lawsuit.

6. In about April 1981, defendant BROWNFIELD caused the filing of a lawsuit alleging he was the owner of approximately 402,300 shares of General Enertech stock which he falsely claimed to have acquired on about December 15, 1979, by virtue of a promissory note.

7. In about April 1981, defendant BADGER caused service of this lawsuit upon American Registrar and Transfer through defendant KNIGGE.

8. After defendant KNIGGE was served by defendant BADGER with the above lawsuit, defendant KNIGGE teleponed an officer of General Enertech in San Diego, California, and attempted to convince the officer to lift the stop transfer order on General Enertech stock.

9. In exchange for consenting to judgment in this lawsuit it was agreed by the defendants that defendant KNIGGE would be given shares of stock in General Enertech.

10. On about May 6, 1981, defendant KNIGGE consented to judgment in the above lawsuit which ultimately resulted in the subsequent transfer and sale of General Enertech stock with each of the defendants receiving a portion of the proceeds.

OVERT ACTS

11. In furtherance of the conspiracy and to effect the objects thereof, the defendants committed and caused to be committed the following overt acts:

a. On about April 20, 1981, defendant BROWNFIELD traveled from the Central District of California to Salt Lake City, Utah.

b. On about April 21, 1981, defendant BROWNFIELD filed a lawsuit in Salt Lake City, Utah.

c. On about April 27, 1981, defendant KNIGGE made a telephone call from Salt Lake City, Utah, to General Enertech in San Diego, California.

d. On about May 1, 1981, defendant KNIGGE placed a telephone call from Salt Lake City, Utah, to General Enertech in San Diego, California.

e. On about May 6, 1981, defendant BADGER caused 3,200 shares of General Enertech stock to be sold through his account at First Equities Corporation, Salt Lake City, Utah.

f. On about May 7, 1981, defendant BADGER caused about 12,000 shares of General Enertech stock to be transferred to the name of Don Anderson.

g. On about May 13, 1981, defendant BADGER caused a Commercial Security Bank cashier's check to be made in the amount of $18,015.05 payable to J. H. BROWNFIELD.

h. On May 20, 1981, defendant KNIGGE caused about 1,333 shares of General Enertech stock to be sold through his account at Northridge Securities, Inc., Salt Lake City, Utah.

i. In about July 1981, defendant BROWNFIELD met with other co-conspirators in Los Angeles, California.

j. In about August 1981, defendant BADGER met with other co-conspirators in Beverly Hills, California.

COUNT THREE

[18 U.S.C. § 1952]

On about April 20, 1981, in the Central District of California and elsewhere, the defendants JOHN HANNA BROWNFIELD, JOHN JAMES BADGER, and DWAINE KNIGGE caused the defendant BROWNFIELD to travel in interstate commerce from the State of California to the State of Utah with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, bribery in violation of the laws of the State of Utah, specifically, Utah Code Annotated, Section 76-6-508(1)(a) and (b), and thereafter performed and attempted to perform acts to promote, manage, establish, and carry on and to facilitate the promotion, management, establishment, and carrying on of said unlawful activity.

COUNT FOUR

[18 U.S.C. § 1952]

On about May 6, 1981, in the Central District of California and elsewhere, the defendants JOHN HANNA BROWNFIELD, JOHN JAMES BADGER, and DWAINE KNIGGE caused the defendant BROWNFIELD to travel in interstate commerce from the State of California to the State of Utah with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, bribery in violation of the laws of the State of Utah, specifically, Utah Code Annotated, Section 76-6-508(1)(a) and (b), and thereafter performed and attempted to perform acts to promote, manage, establish, and carry on and to facilitate the promotion, management, establishment, and carrying on of said unlawful activity.

COUNT FIVE

[18 U.S.C. § 2314]

On about May 14, 1981, in the Central District of California and elsewhere, the defendants JOHN HANNA BROWNFIELD, JOHN JAMES BADGER, and DWAINE KNIGGE willfully transported and caused to be transported a cashier's check in the amount of $18,015.05 payable to defendant J. H. BROWNFIELD, in interstate commerce from the State of Utah to the State of California, the defendants then and there well knowing said check to have been taken by fraud.

COUNT SIX

[18 U.S.C. § 2314]

On about May 20, 1981, in the Central District of California and elsewhere, the defendants JOHN HANNA BROWNFIELD, JOHN JAMES BADGER, and DWAINE KNIGGE willfully transported and caused to be transported 3 cashier's checks in the total amount of $82,427.41 payable to the defendant BROWNFIELD, in interstate commerce from the State of Utah to the State of California, the defendants then and there well knowing said check to have been taken by fraud.

A TRUE BILL:

_____

FOREPERSON

ROBERT C. BONNER
United States Attorney

ROBERT L. BROSIO
Assistant U.S. Attorney
Chief, Criminal Division

KENDRA S. McNALLY
Assistant U.S. Attorney
Chief, Criminal Complaints

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On August 10, 1988, I served the within Petition for a Writ of Certiorari in re: "John James Badger vs. United States of America" in the Supreme Court of the United States, October Term 1988, No. 87-5029;

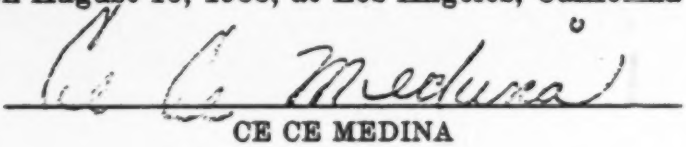
On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Solicitor General of the United States,
Department of Justice,
Washington, D.C. 20530

All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on August 10, 1988, at Los Angeles, California



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